CHAPTER FOUR
TABLE OF CONTENTS

REGULATORY AUTHORITIES

CHAPTER FOUR
TABLE OF CONTENTS

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A. Background on NPDES Regulatory Requirements

(1) Reasons for Regulations

To attain program approval, the CWA requires that States have adequate legal authority to administer the various aspects of the program. Section 304(i) directs EPA to promulgate regulations which establish minimum elements for State programs including monitoring and reporting requirements, enforcement provisions, funding, personnel qualifications, and manpower requirements. The minimum legal authorities, including regulations which every NPDES program must have, are listed at 40 CFR 123.25 and are cross-referenced with the substantive NPDES regulations. The minimum legal requirements for State pretreatment programs are described at 40 CFR 403.10(f)(1).

While State provisions need not be identical to the corresponding federal provisions, they must establish requirements at least as stringent as the federal program. State provisions may be more stringent; however, the State may not make one requirement more lenient as a tradeoff for making other requirements more stringent. Of course, States may adopt additional requirements beyond the federal provisions as they see fit.

Neither the CWA nor EPA regulations explicitly require that a State enact regulations. But unless a State enacts a very specific and detailed statute, administrative regulations are

needed to clearly delineate all substantive and procedural requirements necessary to establish minimum legal authority for program approval. Administrative regulations, which flesh out program requirements, provide a State Director with guidance and uniform procedures to implement the NPDES and pretreatment programs, and alert permittees of the requirements and obligations the program imposes upon them. Finally, such rules guarantee the public an opportunity to participate in the program program development process. This chapter discusses the regulatory authority that States must adopt. Of course, a State may include all of these provisions in its statute.

- States must adopt each provision required by 40 CFR 123.25 in terms at least as stringent as those in the federal rules. Thus, State rules which require inclusion of conditions in permits under section 402 are not adequate unless they are valid incorporations by reference under State law (see below). Instead, the State regulations must contain specific provisions. Similarly, language such as "in accordance with CWA" does not establish a specific standard unless it incorporates the CWA and implementing regulations by reference.

This chapter discusses the various provisions required to be included in State regulations. Several sections are designated "optional" to indicate that States are not required to adopt them. However, if States elect to adopt provisions in these areas, State rules must be at least as stringent as federal requirements. Thus, States need not allow reduced procedural requirements for minor modifications to permits; if they choose

to allow these, however, they can only allow them where authorized by federal rules. In some cases, EPA strongly recommends that States adopt "optional" requirements to facilitate program comprehension by the regulated community and public (e.g., definitions).

(2) Incorporation by Reference

Several States have chosen to incorporate EPA regulations by reference rather than to promulgate a separate, equivalent set of State regulations. While incorporation by reference may make it more difficult for the public and regulated community to determine the applicable requirements, some States have chosen incorporation by reference to ease the administrative burdens of regulatory development. Although EPA discourages this practice because of the increased difficulty in determining requirements, there is no federal prohibition against it. However, many State courts have held that prospective incorporation by reference (automatic incorporation of future federal regulations) is an unconstitutional delegation of legislative authority. Ultimately, State law determines whether incorporation by reference of existing or future EPA regulations is permissible (see, Chapter Three, Part B(1)(j)).

At a miminum, an incorporation must provide sufficient detail for EPA to determine whether all applicable State program requirements have been included. Of course, the Memorandum of Agreement (MOA) and the program description must fully address the permitting procedures which the State intends to use. The MOA should also describe the mechanism for keeping the incorpor-

ation up-to-date and consistent with future changes in the federal law.

(3) Attorney General Involvement

As discussed in Chapter Three, the CWA requires the Attorney General to certify that the State has adequate legal authority to carry out the described State program. This discussion of legal authority necessarily encompasses State regulatory authority (see, 40 CFR 123.23(a)) and the Attorney General's statement must cite to those regulations. State agencies developing or revising program regulations are well advised to involve the Attorney General's office and EPA as early in the process as possible. Early participation by the State Attorney General and EPA will assist the State in narrowing the issues and minimizing delays in program approval. Proposed regulations must be circulated for EPA comment and, wherever possible, EPA's substantive comments should be incorporated (see, Chapter Two, above).

The structure of this chapter does not follow that of Chapter III even though these rules must be cited in the Attorney General's Statement. Rather, we have grouped the regulations into sections with common characteristics to assist persons developing programs. To a large extent, this chapter tracks the NPDES regulations.

B. Required State Program Regulations

(1) NPDES Regulations

(a) Program Scope and Definitions

(i) Definitions (40 CFR 122.2) (Optional)

Many terms used in the regulations are unique and will be unfamiliar to the general public. Others have precise meanings under the NPDES program that may be different from ordinary usage. The federal NPDES regulations define many of these terms. While State program regulations are not required to contain these definitions, in order that these rules be easily understood, EPA strongly recommends that State regulations include a definitions section. If the State elects to adopt these definitions, in either the State statute or the regulations, they must be consistent with the CWA and federal regulations. Even if the State does not adopt them as rules, the State's use of such terms in State regulations and interpretations of those requirements must be consistent with the federal definitions. The State should consult with EPA to determine which State and/or federal terms to define in the regulations.

(ii) Exceptions (40 CFR 122.3) (Optional)

EPA exempts seven types of discharges from NPDES requirements. Most of these exemptions are specifically required by the CWA; others reflect discharges that are not considered point sources under the Act. State regulations may also adopt these exceptions, if authorized by the State's statute, unless the State wishes to regulate these dischargers under the NPDES system. States may not, however, exclude any other discharges from regulations under the NPDES program. For example, a State could not exempt de minimis discharges of pollutants, since neither the CWA nor the NPDES regulations authorize such exclusions. The following are EPA exceptions:

- Sewage from vessels (this exception only applies to sewage; other discharges from vessels must be subject to the NPDES permit program);
- Dredge or fill material regulated under a §404 permit;
- The indirect discharge of pollutants into a POTW (these discharges are regulated under the pretreatment program);
- Discharges made in compliance with the instructions of an on-scene coordinator pursuant to a national oil and hazardous substances pollution plan, or pollution by oil and hazardous substances regulations (see, 40 CFR 1510, and 33 CFR 153.10(e));
- Non-point source agricultural and silvicultural activities;
- Irrigation return flows; and
- Any discharge into a privately owned treatment works (unless the Director requires otherwise under §122.44(m) - see Part B(1)(c)(iii) of this chapter). States may not categorically exempt all such discharges, but must have authority to require contributors to such treatment works to obtain NPDES permits at the Director's discretion.

(iii) Prohibitions (40 CFR 122.4)

State regulations must prohibit the issuance of an NPDES permit under the following circumstances:

- the CWA or implementing regulations will be violated;
- an EPA Regional Administrator has objected to issuance;
- the permit conditions will not ensure compliance with water quality requirements of all affected States;
- the Secretary of the Army believes anchorage and navigation would be substantially impaired;
- the discharge is a radiological, chemical, or biological warfare agent or high-level radioactive waste;
- the discharge is inconsistent with an approved CWA §208 area waste treatment management plan;
- For discharges to the territorial seas, contiguous zone, or oceans, insufficient information exists to make a reasonable judgment whether the discharge complies with promulgated ocean discharge degradation guidelines (40 CFR Part 125, Subpart M); and

- Where a discharge from a new source or a new discharger will cause or contribute to violation of water-quality standards.

Of course, States may prohibit issuance of a permit in other circumstances.

(iv) Effect of Permit Issuance (40 CFR 122.5)

States must, at a minimum, have regulations which clearly indicate that an NPDES permit conveys no property rights or exclusive discharge privilege to the permittee. States may also include a "permit as a shield" provision in State regulations. Under federal law (CWA §402(k) and 40 CFR 122.5), if a permittee complies with its permit, it is considered to be in compliance with section 301, 302, 306, 307, 318, 403, and 405 of the Act (except for toxic effluent standards under §307(a)). A permittee is authorized to discharge pollutants which are not limited in the permit (assuming that the pollutant's presence was disclosed in the permit application). Similarly, EPA's NPDES regulations do not allow new effluent standards, other than toxic standards developed under section 307(a) of the CWA, to be imposed until the permit is modified. This shield concept forces permit writers to draft permits that properly regulate pollutants in the permittee's discharge and provides some measure of certainty to the regulated community. States may choose not to provide this shield to dischargers (in so doing the State would be considered more stringent than the federal program).

(v) Confidentiality of Business Information (40 CFR 122.7)

The regulations must contain provisions for confidentiality of information. The State must ensure that the following information

cannot be claimed confidential and that it must be disclosed upon request:

- Name and address of the applicant;
- The completed permit application and all attachments (although the State may allow supplemental information requested by the Director, but not required by the permit application itself, to be claimed eligible for confidential treatment);
- The NPDES permit; and
- Effluent data, which is broadly interpreted to include information related to determining applicable effluent limitations and toxic, pretreatment, or new source performance standards, and whether the discharger is in compliance with those limits. For example, production data used to calculate permit limits and assess compliance with those limits may be considered effluent data (see, section 308(b) of the CWA and 40 CFR 2.302).

The State may deny confidential treatment to other information.

(b) Permit Application Requirements for All Dischargers

(i) Permit Applications (40 CFR 122.21)

State regulations must require any owner or operator proposing to discharge a pollutant from a point source to waters of the State (other than those discharges specifically exempted) to apply for an NPDES permit prior to commencing the discharge. (Since a new source may not discharge until it receives a permit, it is recommended that States require applications at least 180 days in advance.) If the owner and operator are different people, the State must require the operator to apply, although it may require both persons to apply. Similarly, any discharger operating under an existing NPDES permit has a duty to reapply for a new permit prior to the expiration date of the existing permit. (States may set an earlier deadline for reapplication.) The State regulations

must also specify that, except in the case of general permits, the State may not issue a permit before receiving a complete application form. (Note: NPDES States must also have authority to require users of a privately owned treatment works to obtain an individual permit and submit a permit application or to be a limited co-permittee on the treatment works permit (see, 40 CFR 122.44(m)).

The State must require all applicants to submit the information listed in 40 CFR 122.21(f). This information includes:

- The name, address, and location of the facility (and whether the facility is located on Indian land);
- The operator's name, address, telephone number, ownership status and status as federal, State, private, public, or other entity;
- A listing of all permits received or applied for under other federal and/or State environmental programs;
- A brief description of the business, and up to four standard industrial classification (SIC) codes* which best reflect the principal products or services provided by the facility; and
- A topographic map of the area where the facility is located extending at least one mile beyond property boundaries which depicts the outline of the facility, and all known surface water bodies, drinking-water wells, existing and proposed intake and discharge structures and hazardous waste wells used to inject fluids within a 1 mile of the facility's boundaries.

States must submit a copy of the application form they intend to use to obtain this information, which must at a minimum include the same information as the federal NPDES form (Form 1). Of course, State Agencies are free to modify EPA's NPDES application

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*/ SIC codes are developed and published by the Office of Management and Budget.

forms with the State's letterhead, etc., but they may not eliminate required information. (Additional information or application forms required of certain classes of dischargers are discussed below in Part B(1)(c).)

(ii) Signatories (40 CFR 122.22)

Signatory requirements are intended to ensure a high level of responsibility within the entity applying for a permit or submitting a report. The regulations must provide that all permit applications be signed as follows:

Corporations - By the president, secretary, treasurer, vice-president in charge of a principal business function, or any other person performing a similar policy-making function. However, if authority is properly delegated, a manager of a facility employing more than 250 persons, or having gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars), may also sign the application.

Partnerships and Proprietorships - By any general partner or by the proprietor.

Municipalities, State, Federal and Other Public Agencies - By either a principal executive officer (Regional Administrator/Town Manager) or the ranking elected official (Mayor).

Also, all compliance monitoring reports required by the permit or other reports/information requested by the State agency must be signed by the person or position described above or their duly authorized representative. The NPDES regulations limit who may be named an authorized representative (see, 40 CFR 122.22(b)). States must apply similar limitations.

(iii) Certifications (40 CFR 122.22(d))

The regulations must require all persons signing an application or submitting a report or other required information

to certify the accuracy of the document. The rules also must specify the language to be used by the signatory. At a minimum, the State must require certification language equivalent to the following:

> "I certify, under penalty of law, that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(iv) Recordkeeping (40 CFR 122.21(o))

The regulations must also require applicants to retain all data used to prepare permit applications for at least three years following the date the application is signed. This recordkeeping requirement extends to supplemental information requested by the State agency during the permit development process.

(c) Additional Application Information Required of Certain Dischargers (40 CFR Part 122 - Subpart B)

(i) Industrial and Commercial Discharges

Existing manufacturing, commercial, mining, and silvicultural dischargers must also submit a State application that requires at least the same information as federal NPDES Application Form 2-c or, for non-process discharges, Form 2-e (proposed October 1, 1984, 49 F.R. 38812). At a minimum the State must require the following information:

- The latitude and longitude of each outfall location;

- The name of the receiving water;
- A chart of the water flow through the facility depicting average intake and discharge flows which contribute to effluent and treatment;
- A description of operations or processes contributing to process wastewater, cooling water, and storm water runoff, and the treatment each receives;
- A description of the frequency, duration and flow rates of each intermittent or seasonal discharge occurrence (except for storm water runoff and leaks);
- If an applicable promulgated effluent limitation guideline requires production data, a reasonable measure of the applicant's actual production reported in the same unit of measurement as that in the guideline;
- A description of the requirements and compliance schedule for constructing or upgrading present treatment, if any;
- Quantitative and qualitative data describing the characteristics of the discharge, analyzed using the procedures set out in 40 CFR Part 136. (40 CFR 122.21(g)(7) outlines the minimum discharge data the State must require).
- A list of toxic pollutants which the discharger uses or manufactures as an intermediate or final product or by-product;
- Biological toxicity tests which the applicant knows or has reason to believe have been conducted within the last three years;
- Identity of the contract laboratory or consulting firm (if any) which analyzed the discharger's effluent for purposes of application preparation; and
- Any other information which the State agency reasonably deems necessary.

Certain silvicultural discharges and discharges to aquacultural projects are considered point sources under the NPDES program. These discharges also must submit application form 2-c or the State that meets federal requirements. State regulations must specify criteria at least as stringent as federal requirements for determining which of these facilities

are point sources within the meaning of the CWA and thus subject to NPDES permit requirements. The federal criteria are set out in 40 CFR 122.25 and 122.27.

(ii) Concentrated Animal Feeding Operations

Concentrated animal feeding operations (feedlots) are considered point sources under the CWA. The State regulations must contain criteria for designating which of these facilities are point sources (see 40 CFR 122.23 and Part 122 Appendix B). All point source feedlots must provide the information required on NPDES application Form 2-b or the State's form requiring the same minimum information, including the following:

- The type and number of animals in open confinement and/or housed under a roof;
- The number of acres used for confinement; and
- The design used for runoff diversion and control, if any, including acreage and storage capacity.

(iii) Concentrated Aquatic Animal Production Facilities

Concentrated aquatic animal production facilities (fish farms) are considered point sources under the CWA. The State regulations must contain criteria for determining which of those facilities are point sources (see 40 CFR 122.24 and Part 122 Appendix C). All point source fish farm facilities must provide the following information at a minimum:

- The maximum daily and average monthly flow from each outfall;
- The total number of ponds, raceways, and receiving waters;

- The total annual and maximum harvestable weight of each species of aquatic animal; and
- The calender month of maximum feeding, and the total mass of food fed during that month.

(iv) New Sources

Facilities which may qualify as new sources must also provide EPA and the State with sufficient information to determine whether the applicant is in fact a new source and, therefore, subject to new source performance standards. Interested persons must be able to challenge new source determinations by the permitting authority. States are not required to specify criteria to be used in the new source determinations, although it is recommended that they do so (see 40 CFR 122.29(b)). In determining whether a facility is a new source, States must use criteria equivalent to those in the federal rules.

States also must submit copies of the application forms new sources will be required to use. It is recommended that States have regulations that specify the information to be submitted. EPA recently proposed a revised new source form, 2-d (Oct. 1, 1984 49 F.R. 38812). States will be required to use this form once the final rules are promulgated.

(v) POTW Application Requirements

States must set application requirements for POTWs and submit the application form to be used. In addition to information on its discharge, each POTW should be required to list the dischargers which contribute flow to its flow.

(vi) Storm Water Discharges (40 CFR 122.26)

Storm water discharges are point sources under the NPDES program. State regulations must include storm water discharges as point sources covered by the program. EPA defines storm water point sources at 40 CFR 122.26(b). EPA recently proposed changes to these storm water requirements (August 12, 1985 50 F.R. 32548). Once these changes are promulgated as final rules, States will be required to modify their regulations accordingly.

(d) Permit Conditions and Effluent Limitations

The State's regulations must impose a variety of obligations and duties on dischargers and must specifically require that these be incorporated, either expressly or by reference, in NPDES permits. All permits must contain these minimum permit provisions, as discussed in detail below.

(i) Effluent Limitations (40 CFR 122.44, 125.3)

(A) Technology-Based Effluent Limitations

State regulations must require compliance by all dischargers with applicable technology-based requirements within the time frames specified in the CWA and NPDES regulations. These include the following deadlines for point sources other than POTWs:

- Best practicably control technology (BPT) by July 1, 1977.
- Best available technology economically achievable (BAT) for toxic pollutants and best conventional control technology (BCT) for conventional pollutants by July 1, 1984.
- BAT for nonconventional pollutants by July 1, 1987.

The regulations also must require that technology-based effluent limitations for municipal dischargers be based on secondary

treatment and require compliance with these limitations by July 1, 1977 (see, 40 CFR Part 133). Finally, new sources must be required to comply with applicable new source performance standards.

To implement these technology-based requirements, State regulations must adopt and apply EPA's national effluent limitations guidelines and new source performance standards (40 CFR Chapter I Subchapter N) and secondary treatment information requirements (40 CFR Part 133). State regulations must require State-issued permits to incorporate, at a minimum, limits based on these guidelines. If an effluent limitation guideline is not available or is inappropriate, the State must have authority to impose technology-based treatment requirements on a case-by-case basis using the permitting authority's best professional judgement (BPJ). The requirements and methodology for establishing BPJ limitations are set out in 40 CFR 125.3(c) and (d) (see also, §402(a)(1) of the CWA). The State agency also must be authorized to use a combination of effluent guidelines and BPJ limitations to derive permit limits where limits on pollutants not regulated in the guidelines are necessary to control the discharge.

When implementing these requirements, State law must ensure that permit limits are established for each point of discharge, and must prohibit treatment substitutes such as flow augmentation (dilution) as a means of complying with permit limits. State regulations must require that the permit contain limits on every toxic pollutant discharged at levels above BAT. This can be achieved through limits on each pollutant that is or may be

discharged, or through the use of indicator pollutants.

(B) Water-Quality-Based Effluent Limitations

State regulations must allow the permitting authority to include any requirement necessary to accomplish the following water quality objectives:

- o Achieve water quality standards established under section 303 of the CWA;
- o Attain or maintain a specified water quality through water quality-related effluent limits established by EPA under section 302 of the CWA;
- o Conform to applicable water quality requirements under section 401(a)(2) of the CWA when the discharge affects another State;
- o Impose compliance schedule requirements to meet other water-quality related requirements established under federal or State law;
- o Ensure consistency with the requirement of an EPA approved Water Quality Management Plan under section 208(b) of the CWA; and
- o Incorporate section 403(c) criteria for ocean discharges. (see, 40 CFR Part 125, Subpart D).

(C) Toxic Effluent Standards or Prohibitions (40 CFR 122.44(b), Part 129)

The "permit as a shield" defense authorized by 402(k) (see Part B(1)(a)(iv) of this chapter) is not available for dischargers violating EPA's toxic effluent standards or prohibitions. The regulations must adopt or incorporate EPA's toxic pollutant effluent standards or prohibitions promulgated under section 307(a) of the CWA (40 CFR Part 129). Violation of a duly promulgated toxic effluent limitation is an enforceable violation under the law, even before the State modifies the permit to include them. The State agency must have authority

to require compliance with these standards where the NPDES permit has not been modified to incorporate them.

(D) Compliance Schedules (40 CFR 122.47)

State regulations must provide authority to include schedules of compliance in NPDES permits leading to compliance with applicable effluent limits. New sources, new dischargers, and recommencing discharges may not be issued compliance schedules except in limited circumstances. Compliance schedules must require the permittee to comply as soon as possible, but not later than the applicable statutory deadline.

(ii) Calculation of Effluent Limitations (40 CFR 122.45, 122.50)

(A) Production-Based Effluent Limitations

State regulations must contain provisions for calculating effluent limits where the applicable effluent limitation guidelines are production-based. Permit limits for POTWs may be established using the treatment works design flow, although actual operation data may be substituted. However, design capacity may not be used for non-municipal dischargers subject to production-based effluent limitation guidelines. Instead, permit limits must be based on a reasonable measure of actual production. Generally, this should be a long-term average of the facility's production. Note that variable limits in permits (i.e., tiered limits) allowed if actual production is expected to vary during the permit term, although the State must include restrictions on the frequency and degree of variations and must require notice from the discharger prior to changing to different effluent limits.

(B) Limitations on Metals

The State regulations must specify the basis for calculating effluent limitations for metals. Generally, EPA must establish limitations for metals in terms of total recoverable metals. Exceptions to the norm are listed in 40 CFR 122.45(c), and include wherever the applicable effluent guideline regulate a different form of the metal. Most promulgated guidelines regulate total metals rather than total recoverable metals. State permits should specify the form of the metal upon which the limits are based.

(C) Limitations on Continuous Dischargers

The regulations must require that effluent limitations for non-municipal dischargers that discharge continuously be expressed in terms of "maximum daily" and "average monthly" limits. Effluent limitations pertaining to POTWs with continuous discharges are expressed as "average weekly" and "average monthly" limits, although States may also include other terms, such as daily maximum limits.

(D) Limitations on Non-Continuous Dischargers

Effluent limits for facilities with non-continuous discharges shall contain limitations which correspond to the frequency of the discharge. They must include such measures as are necessary and ensure that the appropriate effluent guidelines and water quality standards are met.

(E) Limits on Mass

State regulations must require that, except for the fol-

lowing situations, effluent limits be expressed in terms of mass:

- Limits involving pH, temperature, radiation or other pollutants which cannot appropriately be expressed by "mass";
- The applicable effluent guideline is expressed in another unit of measurement; or
- The permit limitations are established on a case-by-case (BPJ) basis and expressions in terms of mass are infeasible because the mass of the pollutant to be discharged is unrelated to a measure of the facility's operation.

Of course, States are free to develop permit conditions which are expressed both in mass and concentration measures.

(F) Limiting Pollutants in Intake Water

The regulations may allow an applicant to request that its effluent limitations be adjusted to reflect pollutants present in its intake water. In order to be eligible, the applicant must show either (i) the applicable effluent guidelines specifically authorize calculations on a net rather than gross basis; or (ii) its treatment system would enable the facility to comply with its permit limits in the absence of pollutants in the intake water. The regulations may not allow the granting of credit for intake water pollutants in excess of the pollutant's level in the facility's influent. Credit may only be granted to the extent the permittee needs the credit to meet its permit limits. Credit for generic pollutants is only allowed if the pollutants in the intake and effluent are similar. The intake water and discharge must involve the same water body, although the Director may modify this requirement (see 40 CFR 122.45(g)).

(G) Internal Waste Stream Limits

State regulations must authorize permit writers to impose effluent limitations or standards and monitoring requirements on internal waste streams when it is impracticable or infeasible to establish permit limitations at the point of discharge. The fact sheet for the draft permit must set forth the justifying circumstances whenever internal limits are required. (See 40 CFR 122.45(h) and 124.56.)

(H) Adjustment For Well Disposal, Land Application, or Discharge to POTWs

The discharge of process wastewater to wells, POTWs, or by land application is not treatment within the meaning of the CWA. Therefore, the regulations must require the State to adjust mass-based effluent limitations to reflect a reduction in effluent resulting from partial disposal through these methods. Under the NPDES regulations, this adjustment generally is a flow-proportional reduction in effluent limits based upon the diverted flow. (See, 40 CFR 122.50.)

(iii) Boilerplate Conditions (40 CFR 122.41)

EPA's regulations (40 CFR 122.41) require States to establish the duties and obligations listed below as boilerplate conditions in all NPDES permits. These provisions must be specified in State regulations and must be required to be included in any permit.

- Duty to comply with the permit conditions and §307(a) toxic standards or prohibitions (even if the permit is not modified to incorporate the toxic limit);
- Duty to properly operate and maintain the treatment facility;

- Duty to reapply prior to expiration of the permit;
- Duty to mitigate any noncompliance with the permit;
- Statement that the permit does not convey property rights;
- Statement that the permit may be modified, revoked and reissued or terminated for cause;
- Duty to allow the State agency or its representatives to enter and inspect the permittee's premises, monitor or sample effluent, and examine and copy records;
- Caveat that a discharger may not claim the need to halt or reduce activity in order to maintain compliance with the permit as a defense in an enforcement action;
- Additional conditions which the Secretary of the Army considers necessary to protect navigation and anchorage;
- Conditions requiring vessels transporting, handling, or storing pollutants to comply with any applicable Coast Guard regulations; and
- Conditions specifying that the permittee is subject to the civil and criminal enforcement remedies of the CWA for any permit violation. (The State should specify the applicable provisions of the CWA. It is recommended that States also cite to equivalent State statutory provisions.)

(A) Additional Conditions for POTWs (40 CFR 122.42(b))

The State's regulations must contain authority to include the following conditions in POTW NPDES permits:

- Duty to identify any significant indirect sources which may be subject to categorical pretreatment standards;
- The permit must incorporate the requirements of a local pretreatment program (40 CFR 403), once it has been approved, including reporting requirements (40 CFR 122.44(j));
- Any EPA-imposed conditions or restrictions on grant money (CWA sections 201 and 204) which are reasonably necessary to achieve effluent limitations (40 CFR 122.44(n)); and
- Requirements under section 405 of the CWA and any other State or local regulations on the use or disposal of sewage sludge.

(B) Upset and Bypass

State regulations must require a prohibition on bypass to be included as a condition in all State permits. Bypass must be prohibited, even when in compliance with permit limits (except for essential maintenance). States may excuse bypasses that exceed permit limits only if the bypass was necessary to prevent severe property damage or loss of life and there were no feasible alternatives to the bypass. If States excuse these bypasses, they must require reporting equivalent to that required in the federal rules. (See 40 CFR 122.41(m).)

An upset is a temporary condition beyond the control of the permittee that causes the permit limits to be violated. State regulations may provide upset conditions in permits that allow permittees to claim upset as an affirmative defense to enforcement actions against a violation of technology-based effluent limits. If the State allows upsets, the State rules also must specify the pre-conditions to establishing the defense and require these to be incorporated into permits (e.g., notice, demonstration of cause, mitigation). These must be at least as stringent as the federal requirements. (See 40 CFR 122.41(n).)

(C) Other Conditions

State regulations must provide authority to include best management practices (BMPs) in NPDES permits. BMPs may be used to control toxic pollutant discharges from ancillary industrial activities. States also must have authority to impose these conditions where numerical limitations are infeasible

or when necessary to carry out the requirement of the CWA. (See 40 CFR 122.44(k).)

State regulations must also provide authority to include conditions in permits for privately owned treatment works affecting a user of the system. The user must be included as a limited co-permittee. As discussed above (Part B(1)(b)), the State also must have authority to require the users of the privately owned treatment works to obtain individual NPDES permits (see 40 CFR 122.44(m)).

(iv) Reporting and Monitoring Requirements (40 CFR 122.41, 122.44, 122.48)

State regulations must contain provisions for reporting and monitoring. The minimum requirements to be included in State rules are described below.

(A) Monitoring Conditions

State regulations must require that all permits contain requirements for the permittee to monitor its discharge. The State must have authority to require monitoring that is representative of the discharge.

- o Requirements concerning the proper use, maintenance and application of monitoring equipment (see 122.48(a));
- o Required monitoring activities (type, intervals, frequency, and test procedures to yield representative results of the discharger's activity. Monitoring frequency may be no less than annually (see, 40 CFR 122.41));
- o Requirements to monitor:
  - The mass (or other specified measurement) for each pollutant limited in the permit;
  - The volume of effluent discharged from each outfall; and

- Any other appropriate measurement (40 CFR 122.44(i));

- o Duty to provide relevant information the State agency requires, within a reasonable time;

- o Duty to allow the State agency to enter and inspect the permittee's premises, including monitoring or sampling effluent, and examine and copy records; and

- o Duty to retain monitoring data for at least three years.

States must also have authority in regulations to impose monitoring on internal waste streams, and where necessary to determine eligibility for credits based upon intake water pollutants. (See 40 CFR 122.44(i)(1)(iii).)

(B) Reporting Requirements

As discussed above, State regulations must require that all reports submitted pursuant to the NPDES permit be signed and certified by a person described in Part B(1)(b)(ii) of this chapter or by a duly authorized representative of that person. A person or position may only be authorized if he/it has responsibility for the overall operation of the treatment facility, or overall responsibility for environmental matters of the company, partnership, or agency.

State regulations must also require that the following reporting conditions be included in NPDES permits:

- o Duty to report monitoring data as specified by the permit, but in no case less frequently than once a year;

- o Monitoring data must be reported on a Discharge Monitoring Report (DMR) (EPA's national reporting form);

- o Duty to report progress with compliance schedules within 14 days after each scheduled milestone;

- o Duty to report any anticipated noncompliance with permit limits;
- o Duty to give the State Agency advance notice of any planned changes which may result in noncompliance;
- o Duty to report any noncompliance which may endanger public health or the environment within 24 hours and to follow up such reports with written notice within 5 days. Such noncompliance includes unanticipated bypasses,* upsets, or violations of specified maximum daily discharge limitations.

State regulations must also require permits issued to existing manufacturing, commerical, mining, and silvicultural facilities to include a duty to notify the State agency of new or increased toxic pollutant discharges not expressly regulated by the permit. The State may establish threshold notification levels that differ from EPA's levels as long as the levels are at least as stringent as those set out in the federal regulations at 40 CFR 122.42(a)).

In addition, States must require POTWs to notify the State agency of the introduction of pollutants from any indirect sources which would be required to obtain an NPDES permit if they discharged directly. POTWs also must be required to notify the State of any new or increased discharge of pollutants to the POTW, including changes in volume or character of pollutants.

(e) Other Permit Program Requirements

(i) Duration (40 CFR 122.46)

State regulations must specify the duration of NPDES permits. States may not allow permits to be written for periods longer than five years. States must have authority to issue permits for shorter periods where appropriate.

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*/ A permittee may not intentionally bypass its treatment system unless the bypass was unavoidable to prevent loss of life, personal injury or severe property damage.

States may not issue permits that extend past a statutory deadline unless those permits contain conditions implementing the applicable deadline.

(ii) Continuation (40 CFR 122.6) (Optional)

Under the federal regulations (and Administrative Procedure Act), the permit may be continued in effect beyond its expiration date if the permittee has filed a timely and complete application for renewal prior to expiration of the permit. States are not required to provide for continuation. However, if States elect to continue permits beyond their term, they must specify the requirements for continuation in regulations. These rules must be at least as stringent as federal requirements (e.g., may not allow continuation except where the applicant has filed a timely and complete renewal application).

(iii) Anti-Backsliding (40 CFR 122.44(l))

State regulations must prohibit the reissuance of a permit with less stringent limitations, standards, or conditions than those in the previous permit except where cause exists to modify the permit (see Part B(1)(h) of this chapter). This provision applies to permits based upon BPJ as well as guidelines or water quality standards.

(f) Variances From CWA Requirements (40 CFR 122.21, 124.62, Part 125)(Optional)

The CWA and NPDES regulations authorize several variances to the NPDES requirements. NPDES States are not required to allow dischargers to be granted any or all of these variances. However, if a State chooses to authorize variances, it must

have regulatory requirements and procedures equivalent to those required under federal law. States which do not adopt any or some of these variance provisions should make an affirmative statement to that effect in the program description.

States may not grant all of the variances listed below. Certain variances may only be granted by EPA; States opting to allow these variances may only deny or recommend approval to EPA. (The discussion below identifies which party may grant each variance.) If a State plans to allow its dischargers to obtain these variances, it must establish procedures for reviewing the requests and incorporating the approved variances into State permits.

(i) Non-POTW Variances

(A) Delay in POTW Construction (§301(i)(2))

This variance is available to a discharger that intends to connect to a POTW upon completion of the treatment works' construction. The request must have been filed by 6/26/78, or 180 days after the POTW files for a similar extension due to unavoidable construction delays, whichever is later, but in any event no later than 12/25/78. The State may grant such variances, which extend the compliance deadlines for BCT and BAT.

(B) Innovative Technology (§301(k))

The State may extend the statutory BCT and BAT compliance deadlines where the discharger intends to use "innovative treatment technology." The proposed technology must have the

potential for industry-wide application and produce either a significantly greater effluent reduction than would be achieved by BAT or achieve the same level of pollution reduction as BAT but at a significantly lower cost. A §301(k) request must be made before the end of the public comment period for the facility's NPDES permit and must demonstrate how the requirements of 40 CFR Part 125, Subpart C, and 40 CFR 124.13 have been met. State regulations may not allow compliance extentions beyond July 1, 1987.

(C) Thermal Discharge Variances (§316(a))

A request for a thermal variance must be filed with the permit application unless thermal effluent limitation guidelines have been established or the limitations are based on water quality standards. Where these latter circumstances are present, the request may be filed at any time before the close of the public comment period for the facility's NPDES permit.

(D) Fundamentally Different Factors (FDF) (40 CFR Part 125, Subpart D).

This variance allows a discharger which is fundamentally different from those facilities considered by EPA during the development of an otherwise applicable national effluent limitation guideline to request different effluent limitations. An FDF request must be made by the close of the public comment period for the facility's NPDES permit. The applicant may be any interested party and, as part of the request, must demonstrate how the requirements of 40 CFR Part 125, Subpart D, and 40 CFR 124.13 have been met. An FDF determination may result in

either more or less stringent effluent limits than those otherwise imposed under a guideline.

FDF requests for less stringent limitations may only be approved where compliance with effluent limitations guidelines would result in a removal cost wholly disproportionate to the removal cost considered during the guideline's development or where imposition of the guidelines would result in a fundamentally more adverse non-water quality environmental impact than those impacts considered during development of the guideline. In no case may the alternative limitations requested be less stringent than is justified by the demonstrated fundamental difference. In addition, the alternative limitations must comply with sections 208(e) and 301(b)(1)(C) of the Act, including water quality standards or other more stringent State regulations The factors which may qualify a facility as fundamentally different are set out in 40 CFR Part 125, Subpart D and must be specified in State regulations. Only EPA may grant FDF variances.

(E) Variances for Nonconventional Pollutants (CWA §301(c) and (g))

The §301(c) variance is available for dischargers who can show that the requested modification (to BAT guidelines for nonconventional pollutants) represents the maximum use of technology within the economic capability of the owner and will result in reasonable further progress toward eliminating the discharge of pollutants.

Under section 301(g), a discharger may request a variance

from BAT guidelines for nonconventional pollutants where it has complied with BPT limitations, and can demonstrate that the requested modification will not create an additional burden for other dischargers or interfere with aquatic life or human health in the vicinity of the discharge.

Applicants for 301(c) and 301(g) variances must have submitted an initial request to both the State Agency and EPA no later than 9/25/78 where the guideline in question was promulgated before 12/27/77; or within 270 days of a guideline's promulgation after 12/27/77. A final request, demonstrating how the requirements of 40 CFR Part 125, Subparts E and F, and 40 CFR 124.13 have been met, must be submitted no later than the close of the public comment period for the facility's NPDES permit. Only EPA may grant these variances.

(F) Adjustments to Water-Quality Standards (§302(b))

When EPA develops permit limitations based upon water-quality criteria which are more stringent than the applicable technology-based limitations pursuant to section 302 of the CWA, a permittee may request an adjustment if he can show that there is no reasonable relationship between the economic and social costs and the benefits to be obtained form the more stringent effluent limitation. This adjustment is not really a variance, but is actually part of EPA's standard-setting process State regulations should require requests for adjustments of water-quality related effluent limitations to be supported by adequate justification, and filed no later than the close of

public comment period for the facility's NPDES permit.

(ii) POTW Variances

(A) Delay in POTW Construction (§301(i))

States may grant POTWs a compliance extension under section 301(i) of the CWA. That section allows a POTW to request an extension of the municipal compliance deadline because of a delay in funding for construction. Such a request must have been filed by 6/26/78. Compliance with secondary treatment or water quality-based effluent limitations may not be extended beyond July 1, 1988.

(B) Marine Discharges (§301(h))

A POTW discharging to the territorial seas may request modification to otherwise applicable secondary treatment requirements in accordance with 40 CFR Part 125, Subpart G. Only EPA may grant these variances.

(C) Adjustments to Water Quality Standards (§302(b))

POTWs may also request adjustments to water-quality based effluent limitations established by EPA pursuant to §302. The requirements and procedures are the same as for non-POTW dischargers (see above).

(g) Procedures for Permit Applications, Permit Issuance and Public Participation

(i) Processing Permit Applications (40 CFR 124.3)

In order to receive program approval, the State must have regulations that require public involvement in the permit issuan process. The State Agency must not commence processing a

permit application until the applicant has fully satisfied the application requirements discussed in Part B(1)(b) of this chapter.

(ii) Draft Permit Development (40 CFR 124.6)

The State Agency must prepare either a notice of intent to deny the application, or a draft permit for every permit application it receives (a notice of intent to deny is a type of draft permit). Causes for permit denial are discussed at Part B(1)(h) of this chapter. Draft permits must also be prepared whenever the permit is modified, revoked and reissued, or terminated. A draft permit must include all of the following elements:

- o The boilerplate conditions set out in section B(1)(d) above;
- o Effluent limitations calculated and established from the requirements set out in section B(1)(d) above; and
- o All other appropriate provisions including compliance schedules and monitoring and reporting requirements.

(iii) Fact Sheet Development (40 CFR 124.8, 124.56)

State regulations must require that a fact sheet be prepared for permits issued to major dischargers, as well as certain other discharges as specified in 40 CFR 124.8(a). The purpose of the fact sheet is to explain the basis for any permit condition and thus allow meaningful public comments on the draft permit. Accordingly, the fact sheet must set out the following significant factual, legal, methodological, and policy questions considered in preparing the draft permit:

- o A brief description of the type of facility or activity being permitted;
- o The type and quantity of wastes or pollutants to be discharged;
- o A summary of the rationale for the permit limitations including an explanation of their basis and why BPJ limits or limits on toxic pollutants, internal waste streams, or indicator pollutants are applicable;
- o Reasons supporting or contravening a variance request including all calculations used; and
- o A description of the procedures for reaching a final decision including opportunity for public participation and a person to be contacted if more information is desired.

(iv) Public Notice and Comment Procedures (40 CFR 124.10, 124.11, 124.12)

The regulations must require that every fact sheet and draft permit be publicly noticed. The public notice must identify the name and address of the processing office, the name and address of the applicant, a brief description of the business conducted at the facility, a description of the general location of each outfall, and a description of the procedures for submitting comments. The notice must also provide for no less than a 30-day public comment period during which any interested person may submit written comments and request a public hearing. Subsequent notices (e.g., a notice announcing the scheduling of a public hearing, which must be issued at least 30 days prior to the hearing) must reference all previous notices relating to the permit. Finally, where the notice is for a public hearing, the notice must designate the date, time, and place of the hearing and specify its nature and purpose.

The State's regulations must specify that public comments will be considered before making a final decision; that significant comments will be responded to in writing and made available to the public; and that any provisions in the final permit which differ from the proposed permit will be noted and explained in the written response to comments.

(v) Distribution of Notice (40 CFR 124.10(c), (e))

States must specify how and to whom the public notice will be disseminated. State rules must assure that all notices will be mailed to the applicant, the U.S. Corps of Engineers, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and any other interested federal or State agencies with jurisdiction over wildlife, natural resources, coastal zone planning, or historic preservation. The notice should also be sent to all persons on the State's general mailing list, and any unit of local government having jurisdiction over the geographic area where the discharge will occur. In addition, notices for major facilities or general permits must be published in the daily or weekly newspapers within the area affected by the facility or permit. The regulations may also require notice by other means constituting legal notice under State law.

Finally, the regulations must require that copies of the permit application and draft permit (if any) be mailed to the applicant and interested persons, including local, State and federal agencies. See 40 CFR 124.10(c)(1)(i-iv) for a complete list of persons to be mailed these documents. Other persons

on the mailing list need only be sent the public notice unless they request additional information.

(h) Transferring, Modifying, Revoking and Reissuing, and Terminating Permits

(i) Transfers (40 CFR 122.61)

State program regulations must restrict transfer of NPDES permits and corresponding responsibilities upon change in ownership to the following two methods:

- The permit may be revoked and reissued, or modified to identify the new permittee using the modification procedures outlined below; or
- The permit may be automatically transfered if the existing permittee notifies the Director at least thirty (30) days in advance of the proposed transfer date, and produces a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibilities, coverage, and liability; and the State Agency agrees.*

(ii) Modification (40 CFR 122.62, 124.5)

The State regulations must contain procedures and standards regarding permit modification. Unless the change is a minor modification under 40 CFR 122.63 (see below), the State agency must prepare a draft permit for public comment. See, 40 CFR 122.62. The State need not prepare a draft permit where the State denies the request for modification or revocation and reissuance, but need only provide notice to the person requesting the change.

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*/ The automatic transfer is effective only if the Director does not notify the existing and proposed permittees of his intent to modify or revoke and reissue the permit (see 40 CFR 122.61).

EPA's regulations limit the causes for permit modification. The State may adopt any or all of these causes as it sees fit. However, NPDES States may not create additional causes or justifications for modification, nor may they establish a general provision authorizing modification "for cause." State rules must specify the applicable causes for permit modification. EPA's causes for NPDES permit modifications (or, where the permittee agrees, for revocation and reissuance) are limited to the following:

- o Material and substantial alterations to the facility;
- o New information not available at the time of permit issuance that would justify different conditions;
- o New regulations or judicial decisions revising a regulation on which the permit was based.*
- o To incorporate an approved variance request;
- o To incorporate a section 307(a) toxic effluent standard or prohibition;
- o When required by a reopener condition in the permit;
- o When an eligible permittee requests effluent limitations on a "net basis", or where the discharger loses its eligibility for net limitations;
- o As necessary to require development of or incorporate conditions of an approved local pretreatment program;
- o Where the permittee demonstrates that the operation and maintenance cost of complying with BPJ effluent limitations is totally disproportionate from the operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline;
- o To correct technical mistakes or mistaken interpretations of law made in determining permit conditions;

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*/ Note that the permittee must request such modification within 90 days of publication of EPA's revisions in the Federal Register or of the judicial decision.

- When the discharger has installed treatment technology pursuant to a BPJ permit limitation, and has properly operated and maintained the facility, but has nevertheless been unable to achieve those limits, the permit may be modified to reflect the levels of pollutant control actually achieved, but in no case may the modified limits be less stringent than required by a subsequently promulgated effluent guideline;

- Upon failure of the permitting State to notify another State whose waters may be affected by a discharge from the permitting State pursuant to section 402(b);

- When the level of discharge of a pollutant, not limited by the permit, exceeds the level which can be achieved by the appropriate technology-based treatment requirements.

- To establish a "notification level" as provided in section B(1)(d), above.

- A compliance schedule may be modified when the Director believe good cause exists, however, in no case may an NPDES compliance schedule be modified to extend beyond an applicable CWA statutory deadline.

(iii) Causes for Minor Modification (40 CFR 122.63) (Optional)

In limited circumstances, States may modify a permit without public notice and comment, with the permittee's consent. However, these modifications are limited to minor changes in the permit conditions, such as correcting typographical errors or increasing monitoring frequency (although not decreasing). States may not adopt any causes for minor modification other than those listed in 40 CFR 122.63. However, States are not required to allow minor modifications.

(iv) Causes for Modification/Revocation and Reissuance (40 CFR 122.62(b))

Revocation and reissuance is similar to permit modification, but involves reopening the entire permit rather than just the provision intended to be modified. A permit may be reissued

with a new 5-year permit term, unlike a modification which may not change the permit duration. Revocation and reissuance follows the same process that is used for modification.

The State's regulations may allow permit modification, or revocation and reissuance, where cause for termination exists (as outlined below), but the State agency determines that modification or revocation and reissuance is more appropriate. In addition, a permit may be modified or revoked and reissued where the State Agency receives notice of a proposed transfer of permit responsibility as discussed under "Permit Transfers" above.

(v) Causes for Termination/Renewal Denial (40 CFR 122.64, 124.5)

State regulations may specify any number of causes for terminating permits or denying renewal. However, the regulations must allow the State Director to terminate a permit or deny a renewal application for at least the following causes:

- o Failure to comply with any of the permit conditions;
- o Failure to disclose all relevant information on a permit application or other misrepresention of any relevant facts at any time;
- o The facility or activity presents a danger to human health or the environment; or
- o A change occurs in the discharger's circumstances requiring a temporary or permanent reduction or elimination of the pollutants controlled by the permit.

If the Director tentatively decides to terminate a permit, the regulations must require issuance of a notice of intent

to terminate using the same procedures as those used for proposing draft permits (a determination to terminate a permit or deny renewal constitutes a type of draft permit; see, Part B(1)(g) of this chapter).

(i) Enforcement and Penalties For Permit Noncompliance (40 CFR 123.27)

Enforcement remedies must be specified in the State's statutes. Where authorized by State law, States may find it helpful to outline these provisions in the regulations. (As noted in Part B(1)(d)(i) of this chapter, these enforcement remedies should also be referenced in each permit.) The required enforcement authority is discussed in Chapter III.

The State program regulations must contain procedures for public participation in enforcement actions through either of the following methods:

(1) Allowing interested citizens the right to intervene in any civil or administrative actions as a matter of right; or

(2)(a) Not opposing interested citizen intervention where permissive intervention is provided under a State statute or regulation;

(b) Investigating and responding, in writing, to all citizen reports of violations; and

(c) Providing a 30 day public notice and comment period on any proposed enforcement settlements.

Option 2 is only available in States that allow permissive intervention.

(j) Incorporation of EPA Test Procedure Guidelines (40 CFR 122.21, 122.44, 403.12)

Whenever a permit requires a pollutant to be sampled and analyzed, the State regulations must require the permittee to use the EPA testing procedures set out in 40 CFR Part 136. It

is recognized that these guidelines will not address every situation. Therefore, approval of alternative testing procedures may be sought from the EPA Regional Administrator, through the State agency. The request will be forwarded to EPA's Environmental Monitoring and Support Laboratory in Cincinnati, Ohio for evaluation and a recommendation on the request.

(2) Pretreatment Requirements

State NPDES programs must include a pretreatment program to regulate indirect dischargers. In addition, all existing NPDES programs must be modified to include authority over such dischargers.

EPA rules require State NPDES programs to have regulations in effect at the time of program approval. This rule generally applies to State pretreatment programs as well (see, 40 CFR 403.10 (g)(1)(i)). However, EPA has created a limited exception to this requirement for States requesting program modifications to add the pretreatment program (see, 40 CFR 403.10(g)(iii)). There are two prerequisites to exercising this option. First, the State must have very specific statutory authority that meets EPA's statutory and regulatory criteria (the statutory criteria are discussed in Chapter III, Part B(2); the regulatory criteria are set out below). Thus, the statute must be more detailed than would normally be required for State program statutory authority (containing similar detail to that which regulations would be required to contain), and it must be self-implementing, that is, capable of being enforced directly without the need of administrative regulations.

Second, the program description must contain a detailed description of the procedures the State intends to use to administer the program (see, 40 CFR 403.10(f)). The Attorney General must also assure EPA that the State agency has a valid legal basis to enforce each of these procedures despite the absence of implementing regulations and without the need for any additional steps, such as issuing an order containing the applicable limits. Obviously, States are not likely to have a detailed statute which satisfies this "self-implementing" requirement. Therefore, most States are expected to promulgate regulations. The regulations required for pretreatment programs follow.

(a) Definitions (40 CFR 403.3)

Many of the terms used in the pretreatment regulations will be unfamiliar to the regulated community and the public. In order to eliminate any ambiguity, the State regulations should define terms that may be unclear. These definitions must be consistent with the definitions in 40 CFR 403.3. While the State need not adopt all of the definitions in that section, EPA requires the following terms be defined: Pass-through, interference, industrial user, new source, pretreatment, pretreatment standards, and pretreatment requirements. However, the State's use of the other terms must be consistent with federal rules. States are strongly encouraged to adopt all of the definitions in 40 CFR 403.3.

(b) Prohibited Discharges, Local Limits, and EPA Categorical Pretreatment Standards

The State must adopt regulations which make pretreatment standards directly applicable to indirect dischargers and enforceable by the State, even where the POTW administers an approved local program. These include national categorical pretreatment standards, prohibited discharge standards and local limits (see below). State regulations that apply pretreatment limitations for indirect dischargers through the POTW's NPDES permit are unacceptable unless the State statute specifically requires indirect dischargers to comply with such limitations, thus providing dischargers with notice of where to find applicable limits. The State must have authority to enforce pretreatment standards and requirements without any intermediary action (e.g., State regulations which require the issuance of an order, and only allow enforcement for violations of the order rather than the pretreatment requirement itself, are not consistent with EPA's requirements). States can, of course, elect to implement the pretreatment program through permits to all indirect dischargers.

(i) Prohibited Discharges (40 CFR 403.5)

State pretreatment regulations must include a general prohibition against discharges of pollutants which may pass through a POTW with less than adequate treatment, or which may interfere with the operation of the POTW. In addition, the State rules must contain specific discharge prohibitions, consistent with 40 CFR 403.5(b), against pollutants with

the following characteristics:

- o Inflammable substances;
- o Corrosive substances;
- o Viscous or dense substances which could block or interfere with the functions of the POTW;
- o Heat (exceeding 40° C or 104° F) sufficient to inhibit the biological treatment of a POTW; and
- o Slug loads.

(ii) Local Limits (40 CFR 403.5(c))

A POTW must be prepared to develop local limitations to control the introduction of pollutants to its treatment system. States must require POTWs developing local programs to establish, after notice and opportunity for public comment, specific numeric limits to implement the general and specific prohibited discharges (see above). Other POTWs must be required to develop and enforce local limits when they have experienced problems with pollutant pass-through or interference, and such problems are likely to recur. Local limitations must be enforceable by the State and EPA as well as the POTW.

(iii) National Pretreatment Standards (40 CFR Chapter I, Subchapter N)

States must adopt regulations that include the categorical pretreatment standards (promulgated in 40 CFR Chapter I, Subchapter N). These State rules must be made directly applicable to indirect dischargers.

(iv) Pretreatment Standards Implementation (40 CFR 403.6)

State regulations must contain provisions for implementing pretreatment standards. For example, the procedure for deter-

mining effluent limitations for facilities that combine wastestreams prior to treatment must be set out. A formula equivalent to EPA's combined wastestream formula is acceptable as would be a flow-weighted average approach, so long as it is at least as stringent as the formula. The State must also prohibit the use of dilution as a full or partial substitute for treatment.

State rules must allow indirect dischargers to request category determinations where the application of a categorical standard to the facility is uncertain or questioned. These procedures must include an opportunity to appeal any State categorical determination to the EPA Regional Administrator. A State's categorical determination may not be appealable under State law unless the Regional Administrator retains the right to make a final determination after all State court decisions are completed.

(c) Industrial Users Reporting Requirements (40 CFR 403.12)

(i) Information required

State rules must require reports from industrial users. At a minimum, the following reports must be required:

- o Baseline monitoring reports are required within 180 days of promulgation of an applicable categorical standard. This report should contain the following items:
  - Name and address of the discharger (owners and operators);
  - List of all environmentally related permits held by the discharger;
  - A brief description of the facility's operations, including the average rate of production and a flow system diagram;

- Measurements of the average and maximum daily process flow (gallons per day). Flow measurements for other waste streams are required where application of a combined wastestream formula may be appropriate;

- Description of the nature and concentration (or mass) of each pollutant in a regulated process. The State must require composite sampling (unless infeasible, in which case grab samples are allowed); and

- A compliance schedule based upon the shortest time necessary to bring the facility into compliance with pretreatment requirements. The schedule may not extend beyond the compliance date in an applicable categorical standard.

o Compliance schedule reports must be submitted for each milestone in the compliance schedule;

o Report of compliance with categorical standards. The State must require submission of these compliance reports at least every six months (June and December). These reports must contain information similar to the baseline monitoring report, noted above; and

o Slug loading report. Industrial users must be required to immediately notify the POTW of any slug loading which could interfere with the treatment works' functions.

States and POTWs may require reports in addition to those described above. They may also increase the frequency of reports or require additional information.

(ii) Monitoring

State regulations must require all monitoring and analysis to be conducted in accordance with EPA's standard test methods in 40 CFR Part 136. In the absence of approved test methods, industrial users may use other sampling and analytical techniques if approved by the Regional Administrator (see, B(1)(j), above). States may specify monitoring requirements on a case-by-case basis. States must require adequate monitoring of all indirect dischargers.

(iii) Signatories

States must have regulations that establish signatory requirements for all reports. Reports from POTWs must be signed by the principal executive officer, ranking elected official, or other duly authorized employee responsible for overall POTW operations.

States must require that reports from indirect dischargers be signed by a principal executive officer (no less than vice-president in authority) or, for partnerships or sole proprietorships, by a general partner or proprietor. In either case, the State may allow the responsible signatory to authorize a representative, responsible for overall operation of the facility originating the indirect discharge, to sign the reports.

(iv) Confidentiality (40 CFR 403.14)

States must require that pretreatment information be accessible to the public, although the State may allow for confidentiality of some business information. However, States must ensure that all effluent data are available to the public without restriction; such data may not be claimed confidential. Effluent data includes monitoring data, as well as such additional information as is necessary for the public to determine whether an indirect discharger is in compliance with applicable pretreatment standards. This includes production data used to calculate pretreatment requirements from applicable production-based categorical standards. Other information must be available to the extent required by the federal confidentiality provisions at 40 CFR 2.302.

(v) Recordkeeping

State pretreatment regulations must also require industrial users and POTWs to retain information for at least three years. Such information shall include all sampling and analytical data used in compiling the reports discussed above.

(d) POTW Pretreatment Programs (40 CFR 403.8)

A State must have regulations regarding the development of local POTW pretreatment programs. These regulations must indicate when local programs will be required, and delineate the procedures and criteria for development and approval of such programs.

Unless the State elects to operate a State-run pretreatment program, it should require all POTWs with flow greater than 5 million gallons per day, as well as those which receive pollutants that may pass through or interfere with the treatment works, to develop local programs. The State agency may also require other POTWs to develop local programs if the circumstances merit it. All currently identified POTWs must be required to develop programs by July 1, 1983; these programs should be either approved or on a compliance schedule for local program development at this time. However, those POTWs not yet identified should not be given more than two years for local program development. The State must regulate directly all industrial users that discharge to POTWs not required to develop pretreatment programs.

(i) Contents of a Local Program Submission (40 CFR 403.8, 403.9)

The State regulations must set out the requirements for local pretreatment programs, including the contents of a program approval request and the substantive criteria that must be met and against which the program will be evaluated. State rules that do not specify the criteria or merely indicate that a POTW have "adequate" authority and procedures are not sufficient.

First, the POTW must be required to have procedures and legal authority to administer a program. Legal authority must at a minimum enable the POTW to do the following:

- Require industrial users to comply with pretreatment requirements. Such authority must also enable the POTW to deny or condition the introduction of new, changed, or increased pollutant volumes and concentrations to itself;
- Control the introduction of pollutants to the POTW by contract, permit, or other mechanism;
- Require industrial users to develop compliance schedules to meet pretreatment requirements;
- Require the submission of notices and self monitoring reports to at least the same extent as required under federal law;
- Enter, inspect, and sample the effluent of an industrial user to ensure compliance independent of self-monitoring data;
- Seek remedies against noncomplying industrial users including injunctive relief and civil or criminal penalties; and
- Comply with the same confidentiality of information requirements as EPA and the State (see, Part B(1)(b)(v), above).

Second, the POTW must also be required to develop detailed administrative procedures to carry out the following:

- o Identify and locate industrial users subject to pretreatment requirements, including identifying the character and volume of pollutants;
- o Notify industrial users of applicable pretreatment standards;
- o Receive and analyze self monitoring reports to determine compliance with applicable requirements;
- o Randomly enter, inspect, and monitor industrial users to determine compliance independent of self-monitoring reports;
- o Investigate evidence of noncompliance; and
- o Publish (at least annually) a list of industrial users that have significantly violated pretreatment standards in the municipality's largest daily newspaper.

The POTW must be required to submit a statement from the city solicitor or comparable city official as part of a POTW's local program application. This statement must describe the city's legal authority to carry out each of the requirements identified above. The solicitor's statement also must explain the legal basis for the administrative procedures which the POTW intends to use to implement the program.

In addition, a complete POTW application must include copies of all statutes, ordinances, contracts, or other legal authorities that form the basis for the POTW's program, a description of the POTW's organization, and a description of the funding and personnel available to the POTW.

(ii) Approval Process (40 CFR 403.9, 403.11)

States must solicit public comment prior to approving or denying a local program request. After determining that the POTW has submitted a complete application, the State

must issue a public notice and provide an opportunity for the applicant, affected States, interested federal, State, or local agencies, and other interested persons to comment and request a public hearing. These procedures are the same as those for NPDES permit issuance (see above Part B(1)(g) of this chapter. The POTW's local program application must be made available to the public on request.

EPA may also comment during this time. States are prohibited from approving a local program if EPA objects in writing. The State regulations must also provide for interested persons to receive notice of the final determination on program approval.

Finally, State regulations must include procedures for modifying the POTW's NPDES permit to include conditions regarding its approved local program.

(e) Removal Credits (40 CFR 403.7)

State regulations may allow POTWs to request authority to adjust the national pretreatment standards otherwise applicable to their industrial users. These "removal credits" must be based upon the POTW's demonstrated ability to consistently remove pollutants introduced from industrial users.

States are not required to allow removal credits nor are POTWs required to request the authority to grant credits. However, if a State chooses to allow credits, the State regulations and criteria for acting upon the the removal credits requests must be at least as stringent as EPA's requirements (see 40 CFR 403.7).

Generally, only POTWs with approved local pretreatment programs may be granted removal credit authority. Industrial users may not request removal credit authority for a POTW and removal credits cannot be granted if it would cause the POTW to violate its NPDES permit or any applicable sludge requirements.

A POTW's request for removal credits must include the following items:

- o A list of pollutants for which credits are requested;
- o Data demonstrating consistent removal;
- o The proposed revised discharge limits;
- o Certification that the POTW has an approved local program;
- o A description of the POTW's sludge use and disposal plan, and a certification that the removal credit will not result in a violation of the plan; and
- o Certification that the credit will not cause a violation of the NPDES permit.

Removal credit requests must be acted upon in the same manner as local pretreatment program applications (see Part B(2)(d)(ii) of this chapter). They must be subjected to public notice and comment, and once a removal credit is approved, the POTW's NPDES permit must be modified to incorporate it as an enforceable condition. In addition, removal credit approvals must be re-evaluated each time the NPDES permit is reissued.

(f) Fundamentally Different Factors Variances (FDFs) (40 CFR 403.13)

EPA regulations provide for FDF variances from otherwise applicable categorical pretreatment standards. State programs may include procedures for allowing FDF variances, although

these are not required. If a State chooses to allow FDP variances, the State procedures must be consistent with EPA requirements. Under EPA rules, a State may deny but may not approve an FDF variance request. Only EPA may grant a variance. State procedures may authorize the State agency to recommend approval to EPA.

The requirements and criteria for FDP requests are identical to those applicable to requests from direct dischargers. These are fully discussed in Part B(1)(f) of this chapter and are not repeated here.

(g) Net/Gross Adjustments (40 CFR 403.16)

State regulations may allow for adjustment of pretreatment requirements based upon the presence of pollutants in the indirect discharger's influent. However, under the federal pretreatment regulations, only EPA is authorized to grant a net/gross adjustment. States choosing to allow net credits must be authorized to impose the adjusted pretreatment requirements once EPA has approved the request.

(h) Upset (40 CFR 403.16)

Although non-compliance with pretreatment requirements is generally a matter of strict liability, EPA regulations allow an industrial user which can demonstrate that the violation was caused by an upset (i.e., circumstances beyond the control of the industrial user) to plead the upset as an affirmative defense in an enforcement action. States may allow industrial

users to establish an affirmative defense of upset. If the State adopts upset provisions they must be at least as stringent as 40 CFR 403.16, and must include the same procedural prerequisites to estabishing the defense (e.g., demonstration of cause, 24 hour notice, mitigation).

(3) Federal Facilities (CWA §313)

The State program must have authority to regulate discharges from federal facilities within the State's jurisdiction. As discussed in Chapter III, Part B(3), frequently such authority can be established if the definition of person appearing in the State regulations is sufficiently broad to encompass federal facilities. Thus, a State definition that specifically references the federal government is adequate. Similarly, if the definition includes government entities, it meets federal requirements if the Attorney General's statement clearly indicates that this term is not limited to State agencies.

It is unnecessary for the State to develop a separate program for regulating federal facilities. One cautionary note is necessary, however. Prior to 1977, State programs were not authorized to regulate federal facilities. Therefore, regulations adopted prior to that time are likely not to contain adequate authority and will most likely need revisions to be consistent with EPA requirements.

(4) General Permits (40 CFR 122.28)

States approved to administer the NPDES program may seek approval to issue general permits. While EPA does not require States to seek this additional authorization, States cannot issue general NPDES permits without an adequate regulatory basis and EPA approval. States seeking general permits authority must have regulatory provisions equivalent to those of EPA.

The remainder of this section summarizes the requirements for general permits authority. For more detail on the nature and use of general permits, see the draft General Permits Program Guidance prepared by Permits Division, EPA HQ (a final version of this guidance will be issued soon).

(a) Sources

General permits may be written only to regulate storm water point sources or a group of point sources which all:

- o Involve the same or substantially similar types of operations;
- o Discharge the same types of waste;
- o Require the same effluent limitations or operating conditions;
- o Require the same or similar monitoring; and
- o In the opinion of the State agency, are more appropriately regulated by a general permit than individual permits.

(b) Scope

EPA's regulations limit the scope of general permits to existing geographic or political boundaries. It is assumed that the requirements of most State-issued general permits will have State-wide applications. However, State regulations must specify the possible scope of general permits.

(c) Coverage

State regulations must provide authority to do the following:

- Require a discharger, otherwise covered by a general permit, to apply for an individual permit;
- Provide an "opt out" mechanism for dischargers, otherwise eligible for general permit coverage, to request an individual permit; and
- Provide an opportunity for dischargers, currently holding individual permits, to request coverage under a proposed general permit.

In addition, the State regulations should delineate the criteria to be utilized by the State in determining which dischargers will qualify for coverage under general permits.

(d) Procedures

Regulations are required for a general permits program. These regulations must ensure that interested persons have an opportunity to petition the State agency requesting that dischargers, covered under a general permit, be required to obtain an individual permit.

State regulations may not automatically terminate individual permits when a general permit, regulating similar discharges, is issued. If a discharger has an existing permit, that permit must be revoked before the discharger may be covered under the general permit. The revocation must allow the same procedures that apply to the issuance or revocation of individual NPDES permits, including public notice and comment.